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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. AND BUCK CONSTRUCTION COMPANY, INC.,
Petitioners,

v.

STATE OF IOWA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

BRIEF OF *AMICUS CURIAE*, THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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The National Association of Home Builders ("NAHB") has received the written consent of the parties to file this brief as amicus curiae in support of the Petitioner and have filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The NAHB represents 180,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has been before this Court either as an amicus curiae in support of, or as of counsel on behalf of, the property owner in prior "takings" cases involving governments' land use decisions. Dolan v. City of Tigard, 114 S.Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992); Yee v. City of Escondido, 112 S.Ct. 1522 (1992); Nollan v. California Coastal Commn., 483 U.S. 825 (1987);[1] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); Williamson County Regional Planning Commission v.

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[1]The NAHB brief was cited approvingly in this Court's Nollan opinion, 483 U.S. at 840.

Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

The just compensation clause serves as a vital shield against oppressive governmental land use regulation. It is of paramount importance to this amicus and its members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for the governmental action that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. The former type of governmental imposition is presented in this case by the State of Iowa's demand that an individual property owner preserve an entire parcel of land for the purpose of anthropological research.

Whether the preservation of Lot 15--the subject parcel of land--for the purposes of preserving an ancient Indian burial ground is a legitimate or even worthwhile goal is irrelevant.[2] The sole question presented is whether this

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[2]Indeed, petitioners concede, and NAHB agrees, that the preservation of archaeological finds is a legitimatepublic goal. Fairness and justice dictate, however, that the public should pay for the cost of the land that is preserved for the benefit of the public, rather than forcing some people alone to bear these public burdens. See Andrus v. Allard, 444 U.S. 51, 65 (1979). "[T]he question at bottom is upon whom the loss ... should fall." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

preservation burden should be shouldered by individual property owners without the State of Iowa providing just compensation. While this would appear to be a settled question of law, the decision below effectively overrules no less than four (4) of this Court's decisions. Indeed, the Iowa Supreme Court has so departed from this Court's prior takings jurisprudence that this Court's intervention is necessary.

The NAHB's interest lies in seeing that the law in this field remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with well-meaning government officials whose actions to achieve a public good may impinge on constitutional guarantees. As Justice Brandeis insightfully admonished:

> Experience should teach us to be most on our guard to protect liberty when government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[3]

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Iowa Supreme Court's decision so radically departed from this Court's prior takings jurisprudence that this Court's intervention is necessary so as to ensure the proper, fair and consistent administration of federal Fifth

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[3]Olmstead v. United States, 277 U.S. 438, 479 (1928)(Brandeis, J., dissenting).

Amendment rights in the State of Iowa. Indeed, in the instant case, the Iowa Supreme Court has sanctioned a 100% taking without compensation. As such, the decision below, in effect, renders certain federal protections for individual Iowa property owners nugatory.

REASONS FOR GRANTING THE WRIT

A. THE IOWA SUPREME COURT DECISION COMPLETELY MISREADS LUCAS, OBVIATING THE RIPENESS DOCTRINE

The majority opinion below reasons that petitioners' title never included the right to build on Lot 15 due to the Iowa state law concerning ancient human remains.[4] "This limitation or restriction on the use of the land inhered in the plaintiffs' title [since 'the State, under existing state law, could have prevented disinternment']."[5] This reasoning is based on a misapplication of Lucas[6] and renders the ripeness doctrine nugatory in the State of Iowa.

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[4]See Petition for Writ of Certiorari, Appendix A at A10-11.

[5]Id. (emphasis added).

[6]Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992).

1. The Iowa Statutory Restrictions Do Not "Inhere" In Lot 15's Title

The majority opinion's holding is based upon a flawed reading of Lucas.[7] The majority opinion misconstrues and misapplies this Court's discussion of preexisting limitations, 112 S.Ct. at 2900, equating the 1976 ancient human remains laws to the law of nuisance.[8] The comparison, and its resulting application, however, is inapposite. In Lucas, the Court discussed the principle of nuisance, which may be defined as:

> [A]ctivity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public. . . .[9]

The Court cited examples of property uses that are inherently unreasonable and, accordingly, may be prohibited or restricted by government, such as activities causing the flooding of another's property or operating a nuclear power plant astride an earthquake fault. 112 S.Ct. at 2900-01. These are activities which the average person knows, or should know, are inherently unreasonable and conceivably

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[7]See Petition for Certiorari, Appendix A at A10-11.

[8]Id.

[9]See Black's Law Dictionary, Fifth Edition.

dangerous and thus, may be prohibited. In other words, the average person knows that his "bundle of rights" does not include the right to use his property in such a way so as to infringe upon the property rights of others.

The petitioners' proposed use of Lot 15 in no way infringed upon the property rights of others. Home building is not a nuisance, even if it means disturbing ancient artifacts. Indeed, home building is one of the most basic and common uses of property. Furthermore, despite the fact that the legislation predated petitioners' acquisition of Lot 15, there was no notice that the government would restrict the property's use. It was not until after the purchase of Lot 15 and the beginning of construction that anyone knew that there were remains present on Lot 15.[10] Indeed, even after the discovery, it was not immediately clear that the government would prohibit the development of the property. Only after the state archaeologist's administrative decision did petitioners learn of the restrictions. It is, therefore, specious reasoning to claim, as the majority decision does, that the restrictions "ran . . . with the land."[11]

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[10]See Petition for Writ of Certiorari at 3. It is interesting to note that the entire use of Lot 15 has been prohibited due to the discovery of approximately one cubic inch of human vertebrae, along with eight other small fragments. One wonders how the average person would go about discovering the presence of these small, subsurface items on a one-third acre lot, much less recognizing their significance.

[11]See Petition for Certiorari, Appendix A at A9.

2. The Iowa Supreme Court Decision Renders The Ripeness Doctrine Nugatory

The ripeness doctrine holds that judicial review of a regulatory taking is inappropriate until such time as the government makes a final decision and declines compensation.[12] "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson County, 473 U.S. at 186. Thus, contrary to the Iowa Supreme Court, the question in this case is not if the State could have prevented disinternment, but when did the State prevent disinternment and deny compensation. As the record clearly reflects, this action did not occur until after the Iowa state archaeologist refused to exercise his discretion and allow the remains' disinternment.[13] It was at that point in time--and not before--that the taking occurred and the administrative process had been exhausted, allowing petitioners to seek their judicial remedies.

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[12]See Williamson County Regional Planning v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

[13]See Petition for Writ of Certiorari at 3-4. See also Iowa Code §§ 263B.9 (authorizing the state archaeologist to allow the disinternment ofancient human remains) and 263B.8 (establishes a cemetery for the reburial of disinterned ancient human remains).

The Iowa Supreme Court dismissed petitioners' contention that the taking occurred when the state archaeologist applied the statutes to Lot 15, holding instead that the mere enactment of the legislation in 1976 prohibited building on Lot 15. This analysis ignores the provisions requiring the disinternment of the remains,[14] as well as those allowing the state archaeologist to prohibit disinternment if he designates the find to be "significant".[15] More importantly, the Iowa Supreme Court's decision fails to consider this Court's admonition against challenging legislation on a takings theory outside the context of a factual setting. This Court clearly stated in Keystone Bituminous Coal Assn. v. DeBenedictis that:

> "the constitutionality of statutes ought not to be decided except in a factual setting that makes such a decision necessary. . . Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property."

480 U.S. 470, 494 (1987)(quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 294-95 (1981)). See also Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972); Rescue Army v. Municipal Court, 331 U.S. 549, 568-575, 584 (1947); Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945).

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[14]Iowa Code §263B.7.

[15]Iowa Code §263B.9.

The majority opinion's analysis rewrites the rules on challenging state action in enforcing federal Fifth Amendment rights in direct contradiction of MacDonald and Williamson County, as well as Hodel and Keystone. In effect, the Iowa Supreme Court has chosen to overrule this Court's holdings and to chart its own course with respect to the enforcement of federal Fifth Amendment rights. This Court should reassert its authority in the State of Iowa.

B. THE IOWA SUPREME COURT'S DECISION SANCTIONS A COMPLETE TAKING WITHOUT COMPENSATION

There has been a one hundred percent (100%) taking in this case for which there has been no compensation. As stated in dissent by Iowa Supreme Court Justice Snell, "[t]his case is about whether the State of Iowa has the right to take a person's land and not pay for it."[16] The Iowa state archaeologist's actions in effect turn Lot 15 into a museum dedicated to the preservation and research of ancient Indian remains. Petitioners have lost all economically viable use of the property, and the property's value has declined from $50,000.00 to $100.00.[17] If the Fifth Amendment's takings clause means anything, this decision cannot stand. The result runs contrary to the Constitution's plain meaning, as well as the totality of this Court's takings jurisprudence.

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[16]See Petition for Writ of Certiorari, Appendix A at A12.

[17]See Petition for Writ of Certiorari, Appendix A at A13.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, the NAHB prays that this Court issue a writ of certiorari to review the judgment and opinion of the Iowa Supreme Court.

Respectfully submitted,

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January 18, 1995